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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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09/934,394

08/21/2001

Charles Gambino

67,500-536

8127

27305

7590

02/13/2003

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EXAMINER

TRAN LIEN, THUY

ART UNIT

PAPER NUMBER

1761

7

DATE MAILED: 02/13/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.  
09/934,394

Applicant(s)  
Gambino et al

Examiner  
Lien Tran

Art Unit  
1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Nov. 18, 2002
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-53 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-53 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s).
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 6) ☐ Other:

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1. The 112 second paragraph rejection is hereby withdrawn.
2. The 103 rejection of claims 1-53 over the Bauman et al and Herting reference is hereby withdrawn.
3. Claims 1-53 are rejected under 35 U.S.C. 103(a) as being unpatentable over the article on "A Waf-Fill's filling adds gourmet twist to quick breakfasts in view of Tang et al, McGlynn et al and Bellamy et al.

The article describes the Waf-Fill product as a gourmet Belgian waffle stick with tunnels of strawberry filling. The product is frozen and is microwavable. Other fillings such as cherry, blueberry, kiwi, mango, passion fruit, syrup can be used.

The article does not disclose the water activity of the waffle, the filling, the formulations for the filling and waffle as claimed and the requirement that the water activity of the filling is lower than the water activity of the waffle.

McGlynn et al disclose savory filling for dough products. They teach the Aw of the filling should be less than the Aw of the rest of the food product. This results in water tending to migrate into rather than out of the filling. If the water activity of the filling is controlled to be lower than the water activity of the crust, water released from the crust can be absorbed by the filling. If the water activity of the filling is kept sufficiently low, the water activity of the filling remains lower than the crust, deterring moisture migration from the filling to the crust. (See col. 4 lines 17-32).

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Tang et al disclose a thermostable edible creme. The disclose that prior art creme is problematic because of the high water activity of the creme. Due to the high water activity, moisture tends to migrate from the cream into the pastry dough and thus makes the dough soggy. ( See col. 1 lines 38-50)

Bellamy et al disclose a waffle batter as shown on table I and II.

Since the article discloses a waffle product, it is obvious the water activity of the waffle is the same because it is the same product as claimed. As to the water activity of the filling, it would have been obvious to one skilled in the art to formulate the filling to have a lower water content and therefore a lower water activity than the outer waffle layer so as to prevent moisture migration from the filling to the outer layer during storage, cooking and consumption; this concept is well known in the art as taught by Tang et al and McGlynn et al. The specific water content depends on the type of filling and it would have been obvious to one skill in the art to formulate the filling to be compatible with the outer layer to obtain shelf stability; this can be readily determined by one skilled in the art. As to the specific filling compositions claimed, it would have been obvious to one skilled in the art to make any filling composition in accordance to the flavor and taste wanted. A typical recipe for waffle batter includes egg, milk, oil, flour, baking powder, sugar and salt as shown by Bellamy et al. Variation from the basic recipe is obvious depending on the type of waffle and the flavor desired. The use of baking powder is equivalent to the use of bicarbonate and leavening acid. It would also have been obvious to add nutritional supplement to the waffle or filling or both when it is desired to enhance the nutrition of

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the product. This is well known in the art as many food products such as cereal bar, juice, bread etc. are fortified with nutritional supplements such as vitamins, iron, calcium etc... It would also have been obvious to select any known fat, sugar, emulsifier, protein, gum, leavening acid; this is a matter of preference. The additional of all these ingredients to the waffle and the filling would have been obvious to obtain specific taste, texture and flavor.

4. Applicant's arguments with respect to claims 1-53 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien Tran whose telephone number is 703-308-1868. The examiner can normally be reached on Wed-Fri. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9310.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

February 8, 2003

*Lien Tran*  
Group 1700